UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

UNITED STATES OF AMERICA,

v. 17 Cr. 630 (ER)

MARK S. SCOTT,

Defendant.

Conference

----------x

New York, N.Y.
July 16, 2019
3:30 p.m.

Before:

HON. EDGARDO RAMOS,

District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
BY: CHRISTOPHER J. DIMASE
NICHOLAS S. FOLLY
LISA P. KOROLOGOS
Assistant United States Attorneys
-and-
JULIETA V. LOZANO
Special Assistant United States Attorney

DAVID M. GARVIN
Attorney for Defendant
-and-
NOBLES & DECAROLIS
BY: JAMES NOBLES

RASKIN & RASKIN
Attorneys for David Pike
BY: MARTIN R. RASKIN
JANE SERENE RASKIN
(appearing telephonically)

(Case called)

MR. DIMASE: Good afternoon, your Honor. Christopher Dimase, for the government. I'm joined at counsel table by Special Assistant U.S. Attorney Julieta Lozano, prosecutor from the Manhattan D.A.'s office, Nick Folly, from the U.S. Attorney's Office, and Lisa Korologos, who is on the government's filter team.

THE COURT: Good afternoon to you all.

MR. GARVIN: Good afternoon, your Honor. James Nobles and David Garvin, for Mr. Scott.

THE COURT: And good afternoon to you.

This matter is on for a status conference. There are a number of things outstanding and a number of motions that are now fully briefed.

What I want to do this afternoon, and then I'm happy to do whatever you folks want to discuss, is I want to give you my opinion on certain of the motions, on the four that were submitted by Mr. Scott. I want to talk to you a little bit more, so that I understand the issue a little bit more, concerning the July 10 and July 12 letters that were submitted concerning the review and what is being done and what should be being done. And the other motion I will take under advisement, the other motion concerning the fraud exception.

With that, let me give you the opinion on the first four of the motions. What I'm doing is I'm denying three of

the motions. I'm denying the motion to suppress. I'm denying the motion to dismiss the indictment. I'm denying the *Brady* motion. But I am granting the motion on the witness list and exhibit list. And I'll be reading this.

The defendant has moved to suppress all evidence seized pursuant to a series of search warrants executed on his properties in September 2018 on the grounds that the affidavits failed to establish probable cause; the affidavits were insufficiently particularized; the search warrants were unconstitutionally overbroad; the seizures exceeded the scope of the warrants; electronic devices have been retained in an unconstitutionally unreasonable manner; and that privileged information was seized without following established procedures.

The Court finds that the search warrants were more than adequately supported by probable cause, were sufficiently particularized and not overbroad. In addition, the warrants were executed in a reasonable manner, and the government seized, reviewed and has retained the evidence appropriately.

The Florida and Massachusetts warrants directed that the items to be seized -- and these are Mr. Scott's two residences, one in Florida and one in Massachusetts -- include the evidence, fruits and instrumentalities of violations of Title 18 of the United States Code, Sections 1956 and 1344, related to the OneCoin business, and each set forth an itemized

list of particular evidence.

This evidence list included, among other things, the documents and communications related to OneCoin; the documents and communications referencing numerous specific individuals and entities; financial agreements and records; and communications constituting crimes, or with coconspirators, all this covering the period July 2015 to the date of the warrant. The list of items to be seized also included evidence concerning the identity or location of any coconspirators; evidence concerning the occupancy or ownership of the two premises; and evidence sufficient to identify Mr. Scott's --

MR. DIMASE: Your Honor, actually, I was going to say Mr. Pike's attorneys -- I didn't know if they were on the line.

THE COURT: I was going to ask. Has anyone communicated with them? Because I haven't heard anything.

THE DEPUTY CLERK: Mr. Raskin is on the line now.

THE COURT: Mr. Raskin is on the line?

MR. RASKIN: Yes, I'm here, and so is Jane Raskin.

THE COURT: Good afternoon to you both.

By the way, you haven't filed anything, correct?

MR. RASKIN: I have not.

THE COURT: OK I just wanted to make sure, because I saw your name on the letter and I didn't think that I'd seen anything from you.

I am about half of a page into a three-and-a-half-page

decision, Mr. and Ms. Raskin.

MR. RASKIN: Fine.

MR. DIMASE: Your Honor, for the record, because I don't know if this was said on the record, the two lawyers on the phone represent Mr. David Pike, who was copied on the crimes fraud and motion to compel application made by the government and responded to by Mr. Scott's attorneys. That's why they were invited to participate today. I actually think that the search warrant motion you've been addressing is necessarily relevant to them, so you're welcome to repeat anything that's been said so far.

THE COURT: I'm not going to repeat anything.

MR. DIMASE: OK.

THE COURT: The list of items to be seized in the Florida warrant additionally included any items purchased by or for Mr. Scott with funds originating from OneCoin, including particular pieces of jewelry, handbags, watches and clocks. The Massachusetts warrant also identified particular items, including certain pieces of jewelry, handbags, again, watches and clocks.

The warrants authorized the seizure of computers and other electronic devices and storage media that may contain any electronically stored information that constituted relevant evidence that was otherwise defined in the warrant.

After the warrants were executed, the defendant was

provided with copies of all hard-copy documents and electronic materials and communications stored on the electronic media seized from the defendant.

With respect to probable cause, again, the law is well established in this circuit.

Probable cause is a "flexible, common-sense standard," which requires a case-by-case analysis of the totality of the circumstances. In considering a request for a search warrant, "[t]he task of the issuing magistrate is simply to make practical common-sense decisions whether, given all the circumstances set forth in the affidavit...,there is a fair probability that contraband or evidence of a crime will be found in a particular place," *Illinois v. Gates*, 462 U.S. 238 (S.Ct. 1983). In this regard, the training and experience of law enforcement officers may bear significantly on probable cause determinates. Inferences drawn by law enforcement agents based on facts known to them, the totality of the circumstances, and their training and experience may all support a probable cause finding.

Moreover, where a search has been conducted pursuant to a court-authorized warrant, "great deference" is due to a magistrate judge's probable cause determination. *U.S. v. Leon*, 468 U.S. 897, 914. "The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before

her...there is a fair probability that contraband or evidence of a crime will be found in a particular place.

To be sufficiently particular under the Fourth Amendment, a warrant must satisfy three requirements. It must, first, "identify the specific offense for which the police have established probable cause"; second, "describe the place to be searched', and third, "specify the items to be seized by their relation to designated crimes." The Fourth Amendment does not require a perfect description of the data to be searched and seized, and indeed "[s]earch warrants covering digital data may contain 'some ambiguity....'" (quoting *United States v. Galpin*, 720 F.3d at 446). The particularity requirement is satisfied if the warrant, including its attachments, enables the executing officer to identify with reasonable certainty those items that the magistrate judge has authorized him or her to seize.

In light of the foregoing, and construing the circumstances in their totality, the facts set forth in the affidavits provide ample probable cause to believe that Mr. Scott engaged in the crimes articulated in the search warrants, including conspiracy to commit money laundering. Indeed, on August 21, 2018, before the Hafer affidavit was signed and the Florida warrant was authorized, a grand jury issued the S6 indictment, concluding, based on the evidence collected in this investigation, that reasonable cause existed

to believe that Mr. Scott committed the crime of conspiracy to commit money laundering. While the defendant argues that the fact of the indictment is irrelevant, and in certain cases it certainly may be, as search warrants generally come before an indictment, here, the magistrate was provided with a copy of the indictment which establishes, as a matter of law, probable cause that the named defendant committed the charged offense. But even if the indictment was not included with the affidavit, the affidavit is nonetheless sufficient.

Even if a warrant lacks probable cause or particularity, or is overbroad, "[t]he fact that a Fourth Amendment violation occurred...does not necessarily mean that the exclusionary rule applies." Thus, suppression will not be warranted where the evidence at issue was "obtained in objectively reasonable reliance on a subsequently invalidated search warrant."

I find that the warrants here were not general warrants authorizing the seizure of all documents. The warrants specifically list the specific offenses for which probable cause has been established; provided a detailed description of the subject premises; and contained a list of specified items, including categories of materials and illustrative lists, and their relation to the designated offenses. The warrants contained a detailed of evidence to be seized, including 15 separate categories of materials, and a

list of dozens of individuals and entities. The warrants were thus sufficiently particular. As such, the warrants enabled the agents to identify with reasonable certainty the items that the magistrate judge had authorized the agents to seize.

Counsel for Mr. Scott also argues that the affidavits fail to establish probable cause that Mr. Scott specifically engaged in criminal activity. I disagree. First of all, the defendant does not appear to argue that the description of OneCoin and its activities probably constitute fraudulent conduct. The question is what Mr. Scott knew. In a section of Agent Shimko's affidavit, which is the one included in the government's response, entitled "Scott's use of Fenero hedge fund to launder OneCoin proceeds," the government describes how Mr. Scott lied to a fund administration firm and the bank about the origin of the moneys passing through this accounts. The Court finds that those allegations provide very strong circumstantial evidence that Mr. Scott knew that the proceeds were part of a fraudulent scheme. In fact, in paragraph 21(n) of the Shimko affidavit --

Could I ask Mr. and Ms. Raskin to stop moving. You're coming through with a lot of noise, at least on my microphone. If you can put it on mute, that would be helpful.

In paragraph 21(n) of the Shimko affidavit, after the fund administration firm first learns about the link between OneCoin and Mr. Scott's firm, it is quoted as communicating

with Mr. Scott as follows:

"The first mention of OneCoin [to the fund administration firm] was only yesterday morning as the counterparty to a contract with IMS, Mr. Scott's firm. This now opens more enhanced due diligence questions around the flow of money from IMS to OneCoin, particularly as there is a large amount of information on the Internet raising concerns about OneCoin, its beneficial owners and the number of investigations by different regulators."

The affidavit then notes that Mr. Scott terminated his relationship with the fund administration firm that very day. That communication and Mr. Scott's reaction to it, again, provide strong circumstantial evidence that Mr. Scott knew, or consciously avoided knowing, about the fraudulent nature of OneCoin's business.

There's also in the affidavit particular procedures that were to be used by the taint team, knowing that Mr. Scott was an attorney, in order to prevent the prosecution team or the investigative team from coming across any information that might be attorney-client privileged. While the defendant notes that those procedures may not have been followed, I find no basis for that determination, as it is also the case that according to the government's representations, items which were seized that were not directly relevant to the items that were specified in the affidavit were returned, or attempts were made

to return them, to Mr. Scott and his attorneys.

With respect to the motion to dismiss, it is well settled in this circuit that "an indictment is sufficient if it, first, contains the elements of the offense charged and fairly informs the defendant of the charge against which he must defend; and second, enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense," (quoting *Hamling v. United States*, 418 U.S. 87 (S.Ct. 1974)).

The Sixth Amendment guarantees a defendant's right "to be informed of the nature and cause of the accusation" against him. And Rule 7 of the Federal Rules of Criminal Procedure provides only that an indictment "must be a plain, concise and written statement of the essential facts constituting the offense charged."

The S6 indictment comfortably meets this pleading standard in that it tracks the language of the applicable statute, and it provides notice of the applicable time period and place of the offense that is alleged to have taken place; that is, the indictment alleges that certain acts in furtherance of a conspiracy to launder money were committed in the Southern District of New York. Nothing more is required.

with respect to the *Brady* motion, pursuant to *Brady v. Maryland*, the government has a constitutional obligation to disclose evidence that is materially favorable to the defendant as to either guilt or punishment, including information that

could be used to impeach a government witness. "The rationale underlying *Brady* is not to supply a defendant with all the evidence in the government's possession which might conceivably assist the preparation of his defense, but to assure that the defendant will not be denied access to exculpatory evidence only known to the government." Evidence is "material" under *Brady* only if disclosure of the evidence will lead to "a reasonable probability of a different result" in the outcome of a trial. Courts have denied specific discovery orders of *Brady* material where the government has made a good faith representation that it understands its discovery obligations and will comply with these obligations going forward. The government has made such a representation here and has, in addition, answered fully, in the Court's view, certain questions that were put to them by defense counsel, which were included as exhibits to Mr. Garvin's motion.

And finally, there is the motion concerning an exhibit list and a witness list, which the defendants have requested, reasonably, I believe, on the facts of this case, two weeks prior to trial. Both sides appear to agree that it is within my discretion to order that such discovery be made and when such discovery should be made. I find that given the size of this case, its complexity and the issues that we will be dealing with going forward and probably up to the day of trial will require that the defendant get these materials two weeks

prior so that trial can begin and proceed without any undue disruption.

That constitutes the decision of the Court concerning those four motions. I will issue a short order either later today or tomorrow for the record.

Now, if we could, Mr. Garvin or Mr. Nobles, I'm happy to hear you first, since you wrote first, on the issue of the review as it is currently taking place.

MR. GARVIN: Thank you, your Honor.

Your Honor, we're talking about the privilege review at this point. I did want to mention to this honorable Court that there was also an issue that was pending for the Court's determination regarding the subpoena. The Court may recall that there was a subpoena issued to the entities that Mr. Scott had formed --

THE COURT: MSSI.

MR. GARVIN: Yes.

THE COURT: OK.

MR. GARVIN: -- designating Mr. Scott as the records custodian and designating Mr. Pike as the records custodian for at least one of the entities, the subpoenas being identical, so there is that matter also, if the Court were inclined, since we are here, at some point today we might spend a few moments addressing.

THE COURT: I'm happy to do that also.

MR. GARVIN: Going to the issue of privilege, your Honor, we have a situation, as the Court is well aware, and as counsel for the government has reflected as early as our last hearing and perhaps even the hearing prior to that, that there are a lot of documents in this case, and it may well be, by the time it's all said and done, that there are over a million documents that were taken during the search warrant of the two homes and have to be considered because Mr. Scott, as everyone knows, has been a lawyer for over 20 years.

We have received from the government the first set of production from the taint team. In or about February, the taint team had requested from the defense assistance by the defendant's providing a list of names that Mr. Scott recalled as clients and as lawyers.

We provided the list, even though Mr. Scott had a fifth Amendment right not to say anything, with the understanding that it would be kept confidential by the taint team and used to assist it in doing its purging of documents from the documents that were taken that are arguably privileged versus those that are not.

We have run into a difficulty, and that difficulty is that the defense does not have the resources to physically inspect all of the documents, those that are contained in the first batch, which are approximately 96,000 pages of documents, and those that are expected to follow. We had stated from

inception that we would like to see the documents that the taint team believes to be not privileged before they are turned over to the trial team so that we can ensure that we agree as to what is privileged and what is not privileged.

To date, the taint team did follow that protocol and did supply to us the first batch of documents, which are the 96,000 pages, broken into two categories: one category which is a category that ran the names as a filter on the computer that we provided with a couple of other key words, such as "lawyer" and "law" and "attorney." That stack that did not have any hits by the computer we are now told that the taint team never visually inspected; they just segregated and took the position that those are not privileged documents and are ready to be turned over to the trial team once the defense reviews them all.

THE COURT: I'm sorry. Your understanding was that that initial bucket that you described was documents that were filtered through the names and key words that you supplied to the government and were not hit on.

MR. GARVIN: That was not our understanding. That is what has happened that the government is proposing.

Our understanding was that, from the defense point of view, the taint team would conduct the procedures it felt necessary to satisfy itself that the documents it was going to produce to the trial team were not privileged. Now we have

learned, subsequent to that fact, that the list that we provided was used to scrub the first production, the first batch, these 96,000 pages of documents, but that if there was no positive hit for any of the words, the key words used, that the taint team did not visually inspect those documents. It just segregated them and took the position that they're not privileged.

THE COURT: Let me, just so that I don't get lost in all of this, just ask the government.

Ms. Korologos, is that accurate?

MS. KOROLOGOS: It probably could be more accurate if I could just clarify.

THE COURT: OK.

MS. KOROLOGOS: Based on what the government did is we took the terms. We created terms based on the list of attorneys and clients and entities that Mr. Scott's counsel indicated that he had an attorney-client relationship with. So I have terms, addresses, names that we ran through the documents that were seized during the search warrants. There are approximately 100,000 documents online, electronic copies.

THE COURT: And did you use only the terms that were provided by the defense, or did you include terms as well?

MS. KOROLOGOS: We didn't use generic terms. We only took a name and the first name within a couple of the letters of law firm domains. If they didn't provide a law firm domain,

we went in and looked through the July emails and found out the law firm domain, so we did add terms, but based on every entity, individual or law firm or attorney, we went in and we tried to do the best we could to make sure that we had search terms that would capture those communications or documents.

THE COURT: And did you share with Mr. Garvin the universe of names or returns that you used to scrub the documents or not?

MS. KOROLOGOS: No, he didn't request those. We do have those. Normally, I would share those with the prosecution team as well.

THE COURT: Right.

MS. KOROLOGOS: So that when they are produced, but we haven't done anything. But I have those reports.

THE COURT: And you also haven't shared them with the prosecution team.

MS. KOROLOGOS: I have not, your Honor.

THE COURT: OK.

MS. KOROLOGOS: Then we have the universe of hits and nonhits. And the ones that hit -- in this case approximately, about 8,000 of the 25,000 did hit, and those were individually reviewed. And then approximately 20,000 did not hit. With that group of documents we would go in and we spot-check. We quality control check it, so we run, we first want to focus on the attorneys and the clients that the defendant has

identified. So we run first names, for instance, just to make sure that we don't need to broaden the terms at all, because the goal is to have everything that hits on any of the identified clients or attorneys fold into the review bucket. And we did actually broaden some of the terms, because when I ran some terms, I could see that some of the terms were a little too narrow, so we broadened those.

Then we also run generic terms, and this is a standard protocol that we do with regard to our ESI search warrants, particularly when there's an attorney. We run terms like "esquire," "attorney," "lawyer," and in the case where there's an older attorney, you have to be a little more creative and try to pull in and make sure that you're doing as many of the possibly privileged documents in the bucket that's going to be reviewed. And so we did that, and again, we broadened some of the terms, moved more documents into the hits bucket, which was then individually reviewed.

THE COURT: OK. So, now you have two buckets, one of documents that hit on the terms and one with documents that did not hit. The documents that did not hit were the approximately 20,000 documents you said?

MS. KOROLOGOS: That's correct.

THE COURT: And those were spot-checked.

MS. KOROLOGOS: Spot-checked, that's correct.

And so when we produced these documents to the

defense, we clarified these were the documents, the first documents that did not hit on any of the attorneys or clients that they identified.

THE COURT: Was it your intention then to provide those 20,000 documents assuming no further review by Mr. Garvin and his crew to the prosecution team?

MS. KOROLOGOS: Yes. We then have them do their responsiveness review and with the goal of then producing the nonprivileged responsive documents to the search warrant to defense counsel. And in most cases we would have just released those documents to the prosecution team, but in this case, based on defense counsels' request and the prosecution team's granting that request, we produced these documents. And we designated different buckets so that the defense counsel could know these were ones that did not go through individual review, did not hit on their clients in the hope that because they were produced in electronic format -- again, these were documents that were originally produced back in November 2018. We have re-produced them in electronic format so defense counsel could run searches and perhaps identify -- which, in fact, they did -- a client that they hadn't previously identified.

THE COURT: Let me ask you this, Ms. Korologos, if I could, and I hope I'm using the right terminology. With respect to the 20,000 documents that you spot-checked, did you use a statistically significant method that's commonly used?

MS. KOROLOGOS: I've been a privilege review logistics coordinator for a little over two years, and I'm working with my counterpart at the D.A.'s office, who has been focusing on privilege reviews, I think, even a little bit longer than me, so both of us did our QCs, and what we tend to do is we each run the terms until we don't hit on any privileged documents. I'm not even reviewing it for documents. I'm just trying to get any hit on documents that look like they could be privileged, so I really just keep going until I don't hit on any more.

THE COURT: OK.

MS. KOROLOGOS: And the 20,000 is actually -- in some cases there are hundreds of thousands of documents and you can't do an effective quality control check at that number; it's not going to be statistically relevant. But with 20,000 documents, which are a subset of -- there are a large volume of documents in this case, which we've been reviewing in addition to the documents seized from Mr. Scott, so we do have a pretty good sense of who are these attorneys that we're presented with, certainly the most relevant ones.

THE COURT: Thank you.

Mr. Garvin, you got those two buckets.

MR. GARVIN: Yes, sir.

THE COURT: And what problem do you see?

MR. GARVIN: Yes, your Honor.

What we have is two buckets. The total is 96,000 pages in this first batch of which in one bucket we have roughly 80,000 pages. That is in the so-called bucket that was nonresponsive.

THE COURT: Can I stop you for a second --

MR. GARVIN: Yes.

THE COURT: -- because it's going to be easy for me to get confused. When you say 90,000 pages and she says 20,000 documents, are we talking about the same pile?

MR. GARVIN: Yes, sir.

THE COURT: OK. Go ahead.

MR. GARVIN: So there's 96,000 pages in this universe of the first batch. Approximately 80,000 pages are in group A, which did not hit for the key words basically that Mr. Scott provided, although Mr. Scott's list was not exclusive.

We were also told that the government supplemented those key words, as just described, and with generic terms such as "lawyer," or there were certain lawyers that they knew of that they added.

OK. No one, to our knowledge, and I think I attempted to confirm this, no one visually eyeballed the 80,000 documents in group A.

MR. DIMASE: I did want to clarify pages versus documents.

THE COURT: Right.

MR. DIMASE: Again, it's pages.

THE COURT: Right.

MR. GARVIN: I stand corrected. Pages, your Honor. The 80,000 pages in group A.

So we endeavored to start to look at those, and within a day or two, we had amassed another 15 names of lawyers and documents that did not relate to this case at all, health records of people and Mr. Scott's mother's cancer treatment documents. And it was obvious to us that this task was going to be a huge task, and the government had to at least eyeball these documents, not simply run a key word check with a computer, because it put all the onus on the defense to eyeball these documents.

THE COURT: Mr. Garvin, now we have a representation from Ms. Korologos that they were, in fact, eyeballed. They weren't individually eyeballed, but they did a spot-check of these documents. And as I understand your letter, once you went through however many documents or pages you went through, you identified ten documents that you believe were improperly put in the nonprivileged bucket. Correct?

MR. GARVIN: Not exactly, your Honor.

We sent ten samples of what we thought -- as we continued this process, there were many documents that were arguably privileged, and what we thought would happen was that we would identify the documents that were privileged and then

we would have a discussion with Ms. Korologos to see what the government's proposal was and we would resolve it ultimately without this Court's intervention.

But what is becoming clear to us is that in the bucket of the documents which did not respond to the key words they used -- and we haven't seen a list of the key words they've used. When we went in there and started looking, unfortunately, we started finding a substantial amount of documents that related to lawyers and a substantial amount of documents that were arguably privileged, and it became clear that now the onus was going to be placed on the defense to look at this set of documents that I'm being told that the government spot-checked, but prior to today, I was not under the belief that they were spot-checked at all. But there is a considerable amount.

Now let's shift to bucket 2.

THE COURT: OK.

MR. GARVIN: Or bucket B. In that group, it is a much smaller amount of pages because these are the ones that actually did hit with the key words that were used. Again, the defense doesn't know which key words were used in totality, because we didn't have the complete list, only what Mr. Scott supplied, which he said from inception were nonexhaustive. But when we went into those documents, we were disappointed to see, for example, Nicole Huesmann, who is known to be the lawyer for

Mr. Scott and for several of these entities that are in this case. She has been interviewed by the government. There were numerous documents and emails between Mr. Scott and Ms. Huesmann on a number of issues still in the stack of documents that hit and that the government was proposing to turn over to the trial team.

THE COURT: Let me do this, Mr. Garvin, because I do want to arrive, if we can, at sort of a practical, pragmatic solution to this. Again, as I understand your letter, you found ten documents that should have been marked as attorney-client privileged. The government tells me that of those, nine they have re-reviewed and they stand by their determination that those documents are not attorney-client privileged. It's one thing to say that the documents of 96,000 pages are replete with pages that have attorney names, it's one thing to have an attorney name, but is it attorney-client privileged?

MR. GARVIN: I understand that, your Honor, and that's why I thought we would have a discussion to work it out. Again, I want to emphasize because I sent ten didn't mean we only found ten. We found binders of documents that we need to discuss with Ms. Korologos.

Your Honor, this is the proposal. I don't want to just come with a problem to the Court. I wanted to come with a proposed solution, and this is the solution that we think could

work.

If the government is going to give us a great deal of documents that nobody has ever eyeballed and now the defense is going to be given the burden of looking at those documents, we need to at least filter out of that mountain of documents documents that don't relate to this case at all. This case relates to OneCoin, and the United States served subpoenas and listed the entities and names, and it's a lengthy list of over 30 entries, of the names and entities that relate to this case. We should not have a million documents to go through. If they ran a scrub based upon the relevant names and entities that the government has listed in those subpoenas, which are all of the relevant names, because when they're issuing a subpoena, they want everything relevant -- they've been investigating this case for two years -- it would remove a very large percentage of these documents.

Again, this indictment covers a period of 2016 to 2018. Mr. Scott's been a lawyer for 20 years. We shouldn't be required to be doing the privilege search, but if we were going to have to double-check what the taint team has done and then bring forward the ones that we think are privileged and try to work it out with the taint team, we should not be saddled with the burden of looking at hundreds of thousands of pages of documents by the time this process is over that don't relate to the trial in any manner.

THE COURT: Let me ask you this. Didn't you ask specifically to be able to do that, to double-check what the taint team has done? That's why you're getting them before the prosecution team, right?

MR. GARVIN: I asked, and I was told by the United States that the scrub that I'm now suggesting will be done by the trial team after they receive all the documents from the taint team. And to me, that is closing the barn door after the horse has left, so we're respectfully asking to change the order, and we think that that will make this more manageable and will make it feasible, and then we can do this without the Court's intervention unless we can't agree on particular documents as to whether they're privileged or not.

THE COURT: Believe me, I'm happy to send you folks away to talk some more, but what is your request?

MR. GARVIN: Once again, my request, your Honor, is that the United States scrub the data with the key words that they believe are relevant to this case, names and entities and key words that are relevant, such as the word "OneCoin," for example, "cryptocurrency," "crypto," "Ruja," "Ignatova," "Konstantin," "Irina."

THE COURT: I understand all that, but you just want a more robust list of terms.

MR. GARVIN: Well, that's not the list of terms that we're claiming attorney-client privilege. We're saying if it

doesn't hit those terms that they've listed on those two subpoenas, then the odds are those documents are irrelevant, and to force the defense to wade through those documents, which will be a mountain of paper, to determine if there are any privileged documents in there is not feasible. We just don't have the resources to accomplish that.

THE COURT: I'll just note for the record that you wanted to start trial yesterday, July 15.

MR. GARVIN: Yes, we did, your Honor, and that was before this presented itself.

But I would say, your Honor, that if the trial team provides the list to the taint team, we expect that a majority of the documents, perhaps even an overwhelming majority, although I'm not certain, because I haven't seen them all, will be separated and so we would be focusing on documents that are relevant, and that would make the search manageable.

THE COURT: Let me do this. I don't know whether this question should be answered by Ms. Korologos or by Mr. Dimase or even by Mr. Folly, who's standing.

That has some sort of facial reasonableness to it. What's wrong with that suggestion?

MR. FOLLY: Your Honor, there are several issues with that suggestion, but just to sort of take a step back, there really is a simple solution to this. Defense counsel has asked to be allowed to review the documents that the taint team deems

to be nonprivileged before they are given to the prosecution team. That was their request. They have no right to do that. There's no authority that grants them that right. The search warrant grants the prosecution team the right to review all responsive documents that are not privileged. So after asking to get access and the ability to review the documents, they're now saying, No, no, no, we're overwhelmed and we have a burden that is being placed on us to review these documents, the solution to that is what we do in most cases, which is that the taint team reviews the documents in the first instance and then all of the documents they deemed to be nonprivileged are released to the prosecution team and the prosecution team reviews them to determine whether or not they're responsive. And then they provide to defense counsel the list of the documents that are deemed to be responsive.

Here, defense counsel wants to completely invert the process and actually have the privilege review team conduct a responsiveness review, and that creates a number of challenges. One is it potentially removes the ability for the prosecution team, the people actually handling the case, who know the facts and are directly involved in the review of all the other case materials, to assess on a document-by-document basis which documents are responsive, because all we would get at the end of this process would be the documents that hit on those search terms, and there could very well be responsive documents that

are not included in that that we are entitled, under the search warrant, to review at some point in this process.

THE COURT: Let me ask you this. Now, as I understand, as I recall from my reading of the papers, Mr. Scott was introduced to CC-1 or CC-2 on some definite date in the not too distant past. I assume that the universe of documents that Ms. Korologos and her colleagues are going through are 20 years worth of his records. Would a time limit on the review be workable? If he didn't meet the coconspirators until, whenever it was, 2015, 2016, why are we reviewing documents going back to 2009?

That's just one suggestion.

The other suggestion is that Mr. Garvin, obviously, and his client have a very strong interest in making sure that the privilege review is as thorough as possible, and it appears as though the list that is currently being used could be enhanced or enlarged in order to possibly capture more potentially privileged documents.

Is there a way that we can further refine or you can further refine the parameters of the search?

MS. KOROLOGOS: Your Honor, I can address that.

THE COURT: Can you get closer to a microphone.

MS. KOROLOGOS: I'm sorry.

Some of the documents we can't ascertain a date, and that is something that -- generally, that is a way that we can

narrow a search warrant, where it's not the filter team doing the responsiveness review that is subjective in any way. But a lot of documents, the hard-copy documents, a lot of them don't have dates, but for the ones that do have dates, that can be a parameter that I think we can impose to try and limit documents.

Turning to the issues raised with regard to the filter review, the filter team produced these documents to defense counsel on May 6. These were 25,000 documents in electronic format that when you do searches, to refer to them as pages is misleading. These are documents that you can do searches, and you can sometimes tell immediately, usually, whether or not it's privileged. If it's a 100-page document that's a publicly available document, you don't have to read every single page. You can tell what it is. Like medical reports, you can tell that it's not an attorney-client communication that's confidential for the providing of legal advice.

So when we said this, we were hoping that defense counsel, as they asked, would actually look at the documents. As Mr. Garvin just said, they didn't even look at these documents until sometime in July when they looked at it for one day and they found these two documents, these ten documents that they've now brought to the Court's attention. I have copies here with me.

Five of the documents were in the bucket that did not

hit on any terms, and I have the terms. They never asked me for the terms. I have these terms. I'll be happy to give them to them. They can run the terms and they can see if more documents come up at issue to run.

As I said, when they gave us the name of this client that I can't tell you, we ran the full document -- all of the documents seized and we'll review those. If defense counsel actually showed me something in my process that's wrong or that can be better, we'd totally do that.

With regard to the second batch, when Mr. Garvin just told you there were communications with Ms. Huesmann, we looked at those. Those were communications with Ms. Huesmann that had no substantive content. They were literally of the caliber of "let's meet tomorrow"; "did you send the document out"? They were not confidential communications in furtherance of legal advice.

One of the documents was a contract that was sent to Mr. Scott from opposing counsel. It only identified the attachment. The cover email made it clear that this came from opposing counsel. It wasn't privileged in any way. Those were five documents that we did look at, and we determined they weren't privileged, and I'm happy to engage -- in our response we told Mr. Garvin I'll sit down with him with those five documents. I'll sit down with him with any documents that he thinks, and I will be open to improvements in our system. But

it's certainly -- you know, we produced these in May. For two months they didn't even look at them. And as Mr. Folly said, we stand by our review. If we've released these nonprivileged documents to the prosecution team, they will then go through and they will do the responsiveness review that is required under the warrant and the law. They'll go through and they'll create a subset of nonprivileged responsive documents which they will produce to defense counsel. This will be a useable number. If any documents slip through that are potentially privileged, the defense counsel can alert us, we can claw those back and we'll take whatever remedial steps are necessary.

If it's something with a Sixth Amendment issue, we'll have to deal with that when it comes, but we are very careful with what we've gone through, and at most, it could be that some of these nonresponsive, like the one that was identified in group 1 that was a client that wasn't identified to us but was an issue that is completely irrelevant to the indictment, and that will likely just get purged out as nonresponsive, once they're allowed to do their responsiveness review.

THE COURT: Mr. Garvin.

MR. GARVIN: Please.

First, your Honor, I'm sorry, but Ms. Korologos is misstating. We didn't just look at this stuff one day in July. We've been working on it periodically throughout the entire period of time once they got it to us on or about May 6. They

didn't ask us for our list until February. They had it for seven months and didn't do anything for seven months.

THE COURT: From February to May is three months, if that's what you're referring to.

MR. GARVIN: No. I'm talking before. They executed the search warrants in September, your Honor, and they asked us in February for the list of names, so there could not have been a scrub of the list of names until we provided the list. And that's what I'm referring to that they didn't do anything for seven months.

With all due respect, this gets us back to the same place, and that's why I keep on making the offer to solve it. Where we're at is that we're going to end up with bucket A, a tremendous amount of pages of documents. I know that the government doesn't want to look at each and every page, but their spot-check is woefully inadequate. We've gone through it and we've found, as I told you before, 14 more lawyers who are in this. Their names never hit, which means they couldn't have been on the search list.

We do not trust -- not because of their integrity but just because of their work product, we no longer have confidence in the taint team's ability to provide documents that are nonprivileged. And quite frankly, the trial team has no confidence either, because our solution is, OK, you, the trial team, know the list of names, the entities, you put them

on your subpoenas, which you served upon us, you have the ability to trim this down to only relevant documents if you wanted to and you won't do it. Why won't you do it? Because they don't have confidence in the taint team scrubbing it with a computer either. They're afraid that maybe they'll miss something. As counsel just said, we'd like to see each document.

Well, by them exercising their right to see each document, what they're doing is they're placing upon the defense the burden of having to inspect every document, including years of documents that are irrelevant, and we shouldn't be placed under that burden.

THE COURT: Mr. Folly.

MR. FOLLY: Your Honor, your Honor's proposal with respect to the date range is a point very well-taken and we think would be entirely appropriate here to ensure that it's precisely narrowed, that there are no documents, to the extent we can narrow it to the time period at issue within the confines of the search warrant, we'll absolutely do that.

THE COURT: That cuts out 17 years of 20 years of documents, right?

MR. FOLLY: Your Honor, I don't think that's accurate. I don't think it would substantially decrease the documents, but of course, we have not been able to review any of them, so I can't directly speak to that.

MS. KOROLOGOS: I could just address it briefly.

So much of it is actually electronic off of a date, off of the computers and such, and a lot of those are not that old, so it's not substantial.

THE COURT: OK.

MR. FOLLY: But your Honor, the core proposal of defendant to essentially have the filter team be doing a responsiveness review before the documents are turned over to the prosecution team is just fundamentally flawed. There's not a burden that's getting placed on defense counsel here. If they do not have the time or if they choose to spend their time doing other things, they do not have to review these documents before they move on to the prosecution team.

We are more than happy to update the list on a periodic basis. That's what happens routinely in just about over single case where there's a privilege review. As responsiveness review is unfolding, you come across new attorney names. You come across new terms. You claw back those documents, once you send them back to the filter team, and they do an additional sweep and take them out of that universe of documents.

THE COURT: I think that's right, and I think that's why it may be a little premature for me to step in, because I think what needs to happen is certainly Ms. Korologos and Mr. Garvin need to get together and talk about what the list

is. And again, I don't know exactly what the communications are between Ms. Korologos and the prosecution team, but would it be appropriate for the prosecution team to be part of that conversation, Ms. Korologos, in terms of what the search list should consist of?

MS. KOROLOGOS: I think so, but in this case -- generally, the prosecution team is involved. One of the ways the prosecution team can be helpful in this manner is that they can let me know if certain types of attorneys are clearly not involved and certain clients are not involved.

In this case, we're hampered because defense counsel is refusing to let me share their attorney-client list with the prosecution team, so that I can't confer with defense counsel, I can't confer with the prosecution team in a meaningful way about what attorneys or clients may or may not be responsive to the warrant. And as I understand, the prosecution team has repeatedly asked the Court to allow the filter team to share the attorney-client list with the prosecution team. There is no basis, there is no Fifth Amendment right or interest in sharing the name of the attorneys. Mr. Scott has indicated these people represented him. I'm not aware of any precedent or authority for keeping that information privileged or Fifth Amendment, and much like clients, client lists, similarly, if any of the clients had a Fifth Amendment interest, they would need to assert it, and it certainly can't be that all of

Mr. Scott's clients through the years shared this.

THE COURT: But it's certainly the case, I think, that Mr. Garvin turned over that list on the understanding that it would not be turned over to the government, and so I would hesitate to do that, at least at this juncture.

Mr. Folly.

MR. FOLLY: On that last point, we want to renew our motion as to that list. We set forth case law both, I believe, by letter as well as in our crime-fraud motion as to why the contents of that list are not privileged and that information should therefore be made available to the prosecution team. For the reasons that we've seen here today at this conference, it would facilitate moving this process forward more quickly, which is a very significant concern that the government has.

We provided the clean 5,000 documents to defense counsel in May. It's now July, and they've essentially obstructed our ability on the prosecution team to actually look at any of those documents. We have a trial in less than three months, and they're continuing by basically refusing to engage in the process that they proposed to impede everyone on the prosecution team from actually reviewing these documents.

THE COURT: This is what I am inclined to do. I am inclined to direct the parties to meet and confer to determine how the current process can be enhanced, either by providing a more robust set of terms which are more likely to pick out the

privileged documents to the extent that they're not being picked out sufficiently thoroughly, according to Mr. Garvin, and maybe limit the time period for documents.

Again, Ms. Korologos, you know a lot more about this than I do, but based on my understanding, a computer will always tell you when a document was last edited or when it was last looked at.

MS. KOROLOGOS: Some of these documents have been scanned, but they were hard-copy documents, so that's not an issue; that was some of the process, so we will try to do that.

But your Honor, I do want to make the point that to date, having produced 25,000 documents to Mr. Garvin, he's only identified one document that we proposed was nonprivileged and is privileged, and of course, we will confer with Mr. Garvin about how to make the process better. But if only one document out of 25,000 has been identified to us that we think -- we didn't know about it, now we know about it, we're re-reviewing those and we're addressing those.

With regard to the other five, like with Ms. Huesmann, we can talk about whether or not there's a privilege, but we looked at those documents, all 4,200 of them, and determined them not to be privileged. Again, until Mr. Garvin identifies even one document out of that bucket that's privileged, I'm hard-pressed to how do I make my system better?

MR. GARVIN: Your Honor, we will certainly meet with

the taint team. We would definitely not be going through this if there was only one document that we believed was privileged that was missed. I think that everyone would recognize that we wouldn't do that.

We are happy to list, enhance the list of lawyers that we previously supplied, because now that we've gone through the nonhit bucket, bucket A, we've identified approximately 14 more, but we think that if the trial team were to participate in this, there are two ways that they could help.

The first is they could provide their own list of names. The defense won't ask to see that list. They can give it to the taint team the same way we were giving our confidential list to the taint team, and that would help. And then the second way, obviously, is that if the trial team would provide the taint team with a list of names that are relevant, that would assist the trial team -- excuse me, the taint team to eliminate the nonrelevant data so we won't be with the burden of inspecting it.

THE COURT: I do want to move on, but let me ask Mr. Folly.

Why not provide Ms. Korologos with a list of terms, OneCoin and other individuals involved in the investigation?

MR. FOLLY: Your Honor, I think this is the core proposal of defense counsel, which is the prosecution team provides a set of search terms to the taint team. The taint

team then runs those search terms through all of the documents and only does a quick review of the ones that hit on those search terms.

Our concern is that, first and foremost, we're authorized under the warrant to review all responsive material not limited to documents that just hit on specific search terms, and at some point, we are going to need to also review those additional documents that don't hit on the search terms for responsiveness. There could be issues with spellings, coded language, any of those things. We're entitled to look at those documents and determine whether they are responsive, irrespective of whether they hit on a search term, and in order to do that we would still have to go through this process.

THE COURT: Yes, but my understanding, and correct me if I'm wrong, is that you give them a term, let's say you give them OneCoin, so every document that hits on OneCoin gets isolated. That's not then put in a privileged pile, right; that's reviewed to determine whether or not it's privileged? Or am I wrong about that?

MR. FOLLY: That is correct, your Honor. That is to determine whether or not it's privileged, but then all of the documents that do not hit on search terms, we're still left with those, and we, as the prosecution team, are still entitled to review them at some point. There could be very, very responsive communications that are in code or that are

misspelled that would still need to go through the process of having the taint team look at them to determine whether they're privileged. And then if defense counsel is still being granted that opportunity, they would look at them as well. So it would not change the ultimate end point here, which is that if defense counsel is insisting on reviewing every document that the taint team determines to be nonprivileged, they will still need to end up reviewing documents that wouldn't hit on the search terms.

THE COURT: OK. Go meet and confer and come back to me as soon as you're ready, if you need to. By the way, just so you know, I am gone next Thursday and Friday. If you need to see me on a quick basis, come back before then and I'll accommodate you.

MR. FOLLY: Your Honor, the government would just request that we impose some deadlines on the parties, just because of the trial date being less than three months away. We would ask that we be required to meet and confer by the end of this week and put something in writing to your Honor within one week of today's conference.

THE COURT: What's today, Tuesday?

MR. FOLLY: Yes.

THE COURT: That works for me.

MR. GARVIN: Your Honor, I apologize, but I'm going on a very short family vacation at the end of this week, so if we

could make it perhaps Wednesday of next week.

THE COURT: We can do Wednesday of next week.

MR. GARVIN: OK. Thank you.

THE COURT: OK. Mr. Garvin, you said you had something else to discuss, the subpoenas.

MR. GARVIN: Yes.

Your Honor, we have a situation in which we have two subpoenas that were made, one that listed Mr. Scott as the records custodian -- these are for the entities -- and the second subpoena listed Mr. Pike as the records custodian for the entity. It's the position of the defense that the government is circumventing the application of the Fifth Amendment by designating an individual and by then tagging that individual with the words "records custodian." There is no objection to producing the records requested by the subpoena, but the subpoena, in the defense point of view, should be addressed and served upon the entity, which we'll accept service of. But then the entity gets to determine the records custodian, and that records custodian and the entity together have the obligation of producing all of the records that are responsive to the subpoena.

If they then say, well, we want to get records from Mr. Pike, if he's not the records custodian, Mr. Pike would have a Fifth Amendment right with regard to the production of his personal records. The same would be true for Mr. Scott,

and so our position is that you can't circumvent these individuals' Fifth Amendment rights by putting their name but after their name putting the words "records custodian." So, we would respectfully ask that those subpoenas be quashed and that the government serve a subpoena on the entity records custodian without designating whether it is Mr. Pike or Mr. Scott.

THE COURT: OK.

Ms. Lozano.

MS. LOZANO: Your Honor, the law is well settled in this area, and to correct Mr. Garvin, there are actually three subpoenas at issue, because initially, the government served one subpoena on Mr. Scott and one subpoena on Mr. Pike. Mr. Pike, for his records, as a custodian, as the director of MSSI (BVI), and Mr. Scott, in his capacity as custodian of records for both MSSI Florida and MSSI (BVI). We subsequently discussed with counsel, and they objected to the combination of both companies on one subpoena, so we broke them up, and now Mr. Scott has two subpoenas as records custodian, one issued to MSSI Florida and one issued to MSSI (BVI).

The government also, in consultation with defense and in response to their request, removed from each of those respective subpoenas the name of the company as one of the listed entities inside, because it would have been -- if the subpoenas had been originally -- sent as originally issued, then MSSI (BVI) would be asked for all records regarding MSSI

(BVI), and that didn't seem to make sense, so we split them up.

So, those are the subpoenas at issue. They were served on Mr. Pike and Mr. Scott as custodians of records, and they requested relevant documents for an ongoing investigation that the government is conducting. And Mr. Scott is not contesting that the subpoenas do seek relevant documents for this investigation that is ongoing and looking at other conspirators and also looking at Mr. Pike's involvement. So those are validly issued subpoenas. They're served on these two individuals as custodians of records. We are not asking for their testimony, and the law is clear that as such, Mr. Scott and Mr. Pike do not enjoy a Fifth Amendment privilege to refuse to comply with these subpoenas for producing the responsive records.

THE COURT: I understand that, but Mr. Garvin says, look, give me the very same subpoena, just make it out to the company and just put a generic custodian of records and you're going to get the documents you want. What's wrong with that proposal?

MS. LOZANO: Well, there's no precedent for that. There's no authority that the government needs to do that. The government has issued subpoenas to valid custodians, and frankly, during the process when counsel indicated that they wanted to engage with the government to try to narrow the subpoenas, we did have some conversations. We ended up

splitting up the one subpoena into two and removing an entity in each. But after that, there were no further conversations, and the defense showed no appetite to engage at all in any kind of revision of the subpoenas.

THE COURT: Let me ask you this. I guess part of my question, and I don't know the answer, I haven't dived into this in some time, but I seem to recall sometimes having issued subpoenas to an entity that just said to the custodian of records.

MS. LOZANO: Yes, if we knew who had the records, because Mr. Pike indicated himself that he was a custodian of records, because before the subpoena was issued, he delivered voluntarily to the government records relating to Fenero and MSSI. So, he indicated he was a custodian of records. We knew that he had records. We knew that Mr. Scott, as the owner of both entities, would have records. And it is appropriate in that circumstance to serve the subpoenas on him, and the law is clear in this circuit. The case of *Grand Jury Subpoenas Issued June 18, 2009*, out of this circuit, indicates and supports the fact that even in the situation where a company, like Mr. Scott's company, is wholly owned by one owner or one shareholder, that person does not enjoy a Fifth Amendment right that he would prevent him or allow him not to respond to the subpoena.

The suggestion that Mr. Garvin makes now is five

months later, and frankly, the government fears it's another dilatory tactic, because rather than engage with us during the period of time they were supposed to engage to narrow the subpoena, they instructed Mr. Pike -- without telling us, they wrote a letter to Mr. Pike and instructed him to turn over all of his responsive subpoenas to them, which he did. So, now Mr. Scott is in possession of both the responsive documents that he has but also Mr. Pike's responsive documents. Again, that establishes that Mr. Pike is actually a valid custodian of records for MSSI (BVI).

Lastly, basically, we fear that it's a dilatory tactic that is putting form over substance, and we have no confidence that if we reissued these subpoenas to a custodian of records that we will get the documents, there will be some other argument, there will be some other protest.

THE COURT: But that's not what Mr. Garvin's saying, as I understood it. He said give me subpoenas for the corporation and you're going to get your documents.

MS. LOZANO: This is five months later. The relevant subpoenas at issue for Mr. Scott were issued in March of this year.

THE COURT: OK.

MS. LOZANO: And lastly, the defendant's argument that underpins the whole objection of the Fifth Amendment right is that somehow the mental process of collecting responsive

documents is equivalent to testimony, and that's just not the law. That is just not the state of the law, or else every record custodian would have to -- would be entitled to assert a Fifth Amendment right and not produce documents, because many times custodians of records in big corporations, there's somebody who is a custodian of records who has no familiarity with the actual documents that are being requested. So that person definitely needs to undergo some sort of mental process to, first of all, familiarize him or herself with the documents and figure out whether they are responsive to the subpoenas. That is the same mental process.

Again, there is no law and there's no precedent or authority that as a custodian, he -- Mr. Scott -- is entitled to assert his Fifth Amendment right.

If we can get a commitment from counsel that if we subpoena, if we re-subpoena to a generic custodian of records, which of course begs the question in a solely owned company who that would be. If the records were returnable within one week of that subpoena with a firm deadline of return date of all responsive subpoenas for those documents, we would be willing to entertain reissuing subpoenas, under those circumstances.

THE COURT: Thank you.

Mr. Raskin or Ms. Raskin, I hear you rumbling there. Is there anything that you wanted to add.

MR. RASKIN: David Pike was served with this grand

jury subpoena as custodian of records, and we agree he is not an appropriate custodian of records. What he possessed -- well, let me go back. At the time that the subpoena was served on him, the company was no longer in business. He had already turned over the hard copies of the documents that he possessed to the FBI. He no longer has access to MSSI's files, either hard copies or electronic. What he possessed were simply those documents contained on his personal computer hard drive, and the materials he has on his hard drive represent just what he received and saved on his personal computer, and nothing more. That's what he has.

At my request, Mr. Pike copied the entirety of his hard drive on an external drive and gave it to me. I did a cursory review and determined that the materials contained what appear to be some attorney-client documents. Clearly I'm not in a position to determine what materials may be privileged, and at the request of Mr. Scott's counsel, I provided them with an exact duplicate of the hard drive containing Mr. Pike's materials since, in my view, they were better situated to make a privilege determination. So Mr. Scott's lawyers now have every single thing that was in the possession of Mr. Pike.

Mr. Scott's counsel advised that they represent MSSI international consultants and that that company has not designated Mr. Pike as its records custodian. It doesn't authorize him to act as its records custodian. It doesn't

authorize him to disclose any of its records, and could demand the return of any of its property, which it now has.

Given this posture, we informed the government that we wouldn't comply with the grand jury subpoena absent a court order. The government filed its motion, and that's where things stand, but it's our position that Mr. Pike is not a proper records custodian for MSSI. A records custodian should be someone who is in the position to gather relevant material possessed by the corporation, and Mr. Pike is plainly not in a position to do that. MSSI should simply designate its own records custodian, and as was pointed out a little while ago, this won't prejudice the government at all since it will still get all of the materials it seeks.

In my experience, and I've been doing this for a while, a corporation gets to designate its own records custodian; the government doesn't get to make that call.

That's Mr. Pike's position.

THE COURT: The bottom line is to the extent that Mr. Pike had any responsive documents, the universe of those documents has been turned over to Mr. Scott's attorneys.

MR. RASKIN: That's correct.

THE COURT: OK.

Ms. Lozano.

MS. LOZANO: Yes, your Honor.

I'd just note there is no legal definition for

custodian of records. It's not as if there is some specific quality of a person that makes him or her not a custodian of records. If you are in possession of corporate records and you work in that company, you are custodian of at least of the records that are in your possession, maybe not the entirety of the corporation, but in your possession, and that's all we're asking for in these subpoenas.

And just to clarify, if the Court is able to confirm with counsel that they will respond to subpoenas that are now reissued -- the government would reissue to just a generic custodian of record, we would be amenable to reissuing those subpoenas. However, we do note that this is the first time that the defense has made that offer, and that is why we are a little bit fearful that it is simply another delay tactic.

THE COURT: OK.

Mr. Garvin.

MR. GARVIN: Yes, your Honor.

Going back, counsel is right that they did serve, there were three subpoenas. The first time the two subpoenas came, one's to Dave Pike and one's to Mark Scott. The one to Mark Scott was for two different entities, and the rider attaching two of the subpoenas said provide all of the following documents that pertain to, and it had a list of names, but one of the names was the actual entity the subpoena was being served on. So, if the subpoena was being served on

MSSI (BVI), in the rider, it also had a whole list of names, including MSSI (BVI).

THE COURT: But that issue was resolved, right?

MR. GARVIN: Right.

So, those were resolved, and we attempted to engage to resolve them and the government agreed to fix that and reissue the subpoenas. But what the government will not agree is the issue of records custodian.

THE COURT: So now we have a potential agreement.

MR. GARVIN: Yes.

THE COURT: If you would agree.

MR. GARVIN: Yes, and we would agree, but what I couldn't agree is that the one-week time frame -- I've already been told that would be next to impossible. We don't want to not deliver after we've entered an agreement.

(Counsel and defendant conferred).

THE COURT: Here's the thing. Why don't you folks talk about that.

MR. GARVIN: Yes.

THE COURT: And if you can't come to a resolution, although I can't imagine why you wouldn't, then I'll decide it.

MR. GARVIN: Yes.

THE COURT: I'll decide the motion. OK?

MR. GARVIN: Yes, your Honor.

THE COURT: What else do we need to do today?

MR. GARVIN: I think that's it.

THE COURT: OK.

MR. DIMASE: Your Honor, I know you mentioned at the beginning of the conference that you were going to keep the crime-fraud motion under advisement.

THE COURT: Correct. That was just fully briefed on Friday, correct?

MR. DIMASE: Yes, that's right. And I fully appreciate the timing being only two days later. But just two things.

One is to the extent the Court has any questions in reviewing those papers and wants to see the parties, the government is certainly open to another conference on the specific issue of the crime-fraud motion.

THE COURT: OK.

MR. DIMASE: And if the Court wants to set that today, we're happy to schedule that, obviously.

The second issue is I just want to make the Court aware, obviously this was only fully briefed two days ago and it's a complicated issue, we fully appreciate that. But there is a tiny flaw on the other end of it, if the Court were to grant the motion insofar as there are still a number of stages that are contemplated even after any exception motion might be granted. In other words, the identification based on the Court's decision regarding the different categories of whether

certain materials fall within those categories, then the production of those materials to the defendant for their opportunity to review them and object, and then potentially a further litigation before the Court regarding particular documents over which there might be some disagreement. That's the proposal we've laid out in the motion, and I just wanted to make that clear as far as the timing.

THE COURT: I think I've committed to making myself available to you next Wednesday.

MR. DIMASE: Yes, your Honor.

THE COURT: Would that be too far out? To the extent there were any issues, could I just bring you back once, or do I need to bring you back twice?

MR. DIMASE: Your Honor, on the date of next Wednesday, I thought that that was a date for the submission of some letter regarding the status of the confer and report back, not necessarily a court conference. That being said, we are happy to appear next week, on Wednesday, if the Court has issues or questions regarding the crime-fraud motion. I would note that the entire team is not here next week, but somebody will be available.

THE COURT: The entire team?

MR. DIMASE: One of the many people at the front table will be available.

MR. GARVIN: Your Honor, I was also sharing the same

impression that we were going to submit documents to the Court on Wednesday --

THE COURT: OK.

MR. GARVIN: -- as opposed to all appearing.

MR. DIMASE: Your Honor, apologies.

Ironically, none of the members of the prosecution team are available Wednesday of next week in particular, but we can certainly work with the Court and find a date that does work. We're happy to meet on both issues to the extent. i think it may make sense to the extent that we did --

THE COURT: If you want to set a date and time now, I'm happy to do that.

MR. DIMASE: Can we confer with Mr. Garvin and Mr. Nobles briefly?

THE COURT: Sure. I'm just gone Thursday and Friday of next week.

MR. DIMASE: Understood.

Your Honor, the parties are still conferring. Apologies for the delay.

THE COURT: OK. It doesn't look like we're going to reach agreement here.

MR. DIMASE: Judge, we're debating next Wednesday, the 24th, versus the following Tuesday, the 30th, to see if we can come on two different dates.

THE COURT: Let me ask you this. If it's helpful,

Thursday early morning I could be here. Early.

MR. DIMASE: Which Thursday.

THE COURT: Next Thursday.

MR. GARVIN: That would be helpful for me. That would be a date that we could come before the Court. I could fly here on Wednesday and then be here in the morning.

THE COURT: By early I mean, like, 9:00.

MR. GARVIN: Fine.

THE COURT: But if that's going to cost another 15 minutes, then let's go back to where you were.

MR. DIMASE: I think the date we were contemplating is Wednesday morning. However, I think Mr. Garvin is unavailable because of a preexisting flight, and so the earliest, I think, the parties would be able to all be available would be the following Tuesday, as much as we'd like to do it sooner than that, the 30th of July.

THE COURT: At what time?

MS. LOZANO: Whenever the Court's available.

MS. KOROLOGOS: I have a conference at 11 a.m. with a privilege issue I have to be at. So other than between 11 and 12, that would be great.

THE COURT: Tuesday afternoon, 2:00.

MR. DIMASE: Perfect.

MS. KOROLOGOS: Your Honor, may I note for the record that Mr. Garvin and I are going to meet before next Wednesday,

and I just handed him the list that we used of the clients and a list of the attorneys so we can be effective and talk about that. And I've requested that he identify the 14 attorney that he's mentioned -- to date I don't know of any of those -- and also any documents to date likely on a rolling basis that he's identified that may be privileged in my production of nonprivileged documents.

THE COURT: OK.

MR. GARVIN: Just to be clear, it's 14 attorneys or search terms, and I'm providing some of those names right now.

THE COURT: Very well.

MR. DIMASE: Thank you, Judge. Just one last point.

If the Court does have particular questions in connection with the crime-fraud motion that it wants us to think about in advance of that proceeding, we're obviously happy to do that.

THE COURT: I'll tee them up.

MR. DIMASE: Thank you, your Honor.

THE COURT: OK.

MR. DIMASE: Your Honor, I believe the Court may have already -- so, sometime back the Court ruled on the trial date.

THE COURT: Yes.

MR. DIMASE: In connection with that ruling, which I think was communicated to the parties maybe by email, there was an indication that there would be some subsequent written order

dealing with, I think -- maybe I'm wrong about that -- dealing with both the trial date and the speedy trial issue. But I think the Court indicated in the communication to the parties that speedy trial time would be excluded.

THE COURT: I thought that was done.

MR. DIMASE: It may have been done. I may be misremembering, but my point today is just that I believe any speedy trial exclusion is granted because I believe the Court has already excluded time through October 7, the date of trial.

THE COURT: That's right. I determined that under the speedy trial clock all the time between now and October 7, whatever the date is, would be excluded because of the complexity of the trial.

MR. DIMASE: Very good, your Honor. We have nothing further.

THE COURT: Thank you, folks.

MR. RASKIN: Thank you, Judge.

(Adjourned)